

Office of Chief Counsel
Internal Revenue Service
memorandum

date: July 2, 2001

to: Connie Neeley
IRS Team Coordinator
Spokane, WA

from: William A. McCarthy
LMSB Attorney
Seattle, WA

subject: [REDACTED] (TL-N-2801-01)
Request for Expedited Refund ([REDACTED] and [REDACTED])

Non-disclosure statement: This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse affect on privileges, such as attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

Per your request, we have reviewed the Collateral Agreement and Surety Bond submitted by the above-referenced taxpayer and our comments and suggestions are set forth below.

The Collateral Agreement and Surety Bond were provided in connection with the taxpayer's request for an expedited refund under Chapter 6 of the Joint Committee Handbook. The taxpayer filed a Form 1120X for its [REDACTED] taxable year claiming a refund of \$[REDACTED] (the refund year). The refund stems from the carryback of a NOL generated in the taxpayer's [REDACTED] taxable year (the source year). Neither the [REDACTED] return nor the [REDACTED] return have been examined to date. More specifically, the audit cycle encompassing [REDACTED] is close to being completed and the audit cycle encompassing [REDACTED] is just beginning.

In providing the suggestions herein, we have made the following assumptions, among others: (a) the correct refund amount is \$[REDACTED], (b) the refund claim has been properly filed and is not time-barred, (c) the taxpayer has no outstanding tax liability which the refund amount should be credited against under section 6402(a), (d) the taxpayer filed its [REDACTED] and [REDACTED] returns with the Ogden Service Center, and (e) the amount of the bond is sufficient to cover the interest component (see I.R.M. 4.3.5.6.5.3(1)).

As a final preliminary matter, the Joint Committee Handbook indicates that the refund shall reflect only the minimum amount to which the taxpayer is entitled, regardless of the outcome of the

unagreed issues. See I.R.M. 4.3.5.6.2(1), 4.3.5.6.2(4), 4.3.5.6.3(1), and 4.3.5.6.3(5). Further, recent Chief Counsel opinions suggest that only a refund stemming from an "agreed overpayment" is contemplated. See FSA 200033003 & FSA 200037039. However, as we read the relevant provisions, section 6402 does not require a final determination that there is an overpayment; otherwise, a refund could never be authorized until there were no unexamined years involved and there would be no need for security. Hence, the Service presumably has some discretion. If you would like further input on this issue, please let me know.¹

A. Collateral Agreement

Our proposed additions are in bold and our proposed deletions are indicated with strikeout.

1. The reference to "IRM 457(10).5" (see heading & first ¶) should be changed to "IRM 4.3.5 Ch. 6" which replaced the prior IRM provisions after April 30, 1999.

2. Revise ¶1 as follows:

The taxpayer filed its returns with the Ogden Service Center. ~~The IRS district with examination jurisdiction is the Seattle District.~~

As you know, the reorganization has eliminated the districts and it may be easier to leave out such an explanation.

3. New paragraph after ¶3:

Neither the [REDACTED] nor [REDACTED] returns have been examined and the purpose of this agreement is to provide security to the IRS for repayment of refunded taxes in the event it is later determined that the refund amount was too large.

4. Regarding ¶4, we suggest changing "Director, Field Operations, Internal Revenue Service, Houston, TX" to "authorized IRS Director or equivalent." The same suggestion applies to ¶6.

¹ Submission of this memo to the National Office for post-review may facilitate getting some feedback on this issue.

5. Revise ¶5 as follows:

The IRS may draw upon the Income Tax Surety Bond upon the **timely** assessment of tax, **interest, or penalties** with respect to the tax year ending [REDACTED] up ~~to the amount of the assessment not being contested by Taxpayer in the United States Tax Court. The three-year period of limitations for assessment under section 6501 has not expired.~~

The amount that may be drawn is equal to the amount of any assessment of tax plus **applicable** interest **provided** ~~under Section 6601~~ and ~~any applicable~~ penalties. Amounts collected under this Income Tax Surety Bond will be applied appropriately to Taxpayer's [REDACTED] corporation income tax, interest, or penalty liability.

The IRS may also draw upon the Surety Bond, up to the full amount of the refund, in the event - (i) the Surety Bond is about to be cancelled by reason of some other event not contemplated herein (e.g., release of the Surety under RCW 19.72.110), (ii) substitute security has not been tendered by the Taxpayer, and (iii) the IRS determines that the need for security has not changed.

Regarding the first paragraph, an assessment generally will not precede a Tax Court petition. Also, as to section 6501, there may be extensions not contemplated thereunder ("timely" has been added as a compromise). Regarding the second paragraph, restriction of interest to a particular code section is unnecessary and risky.

6. Regarding ¶6, "(or his/her delegate)" should be added after "TX" and after "said director." Also, the statement paragraph beginning "The undersigned ..." should be indented the same as the preceding paragraphs.

7. Revise ¶7 as follows:

The Income Tax Surety Bond ~~will~~ **may** be cancelled **or reduced, by written consent of both parties**, upon any of the following events:

- a. Payment of the refund amount (plus interest) ~~that would apply if an underpayment were to be determined for the refund amount.~~

b. Survey of the Taxpayer's returns or completion of an examination of the Taxpayer's income tax liability for [REDACTED] without a proposed deficiency.

c. ~~In the event no statutory notice of deficiency is issued for [REDACTED], the date that the three-year period of limitations found in Section 6501(a) (as extended by agreement) closes.~~ **Expiration of the assessment statute of limitations for both [REDACTED] and [REDACTED] income taxes.**

d. ~~Payment of the full amount of any corporate income tax for [REDACTED] (plus associated interest and penalties) set forth in statutory notices of deficiency, Forms 870 or 870-D.~~ **Agreement of the parties.**

Regarding "d," payment of any tax owing for [REDACTED] (which presumably wipes out the NOL), will not necessarily change the fact the taxpayer owes the entire amount improperly refunded for [REDACTED]. Instead of trying to address all scenarios, we suggest simply adding "agreement of the parties" (which would have to happen under each such scenario).

B. Income Tax Surety Bond

1. In the intro paragraph, we suggest changing "Director, Field Operations" to "authorized IRS Director or equivalent." The same suggestion applies to ¶¶ 2 & 4.

2. It is our understanding that the taxable year ends [REDACTED] and not December 31st. The returns which you provided reflect inconsistent dates.

3. Revise ¶3 as follows:

37. Upon posting of a bond for the amount of the claimed refund **(plus interest)**, the Internal Revenue Service may submit a modified expedited refund request report to the Joint Committee, before the examination or the survey of the Principal's returns for the taxable years ended [REDACTED], which gave rise to the claimed refund.

4. Revise the second to last paragraph as follows:

When the Principal pays **any the** additional income tax

liability due as a result of the final determination, plus interest as provided by law, and otherwise follows the provisions of **the Collateral Agreement (executed in connection with this Surety Bond)**, the Internal Revenue Code and the Regulations, this obligation will be null and void⁷. Otherwise, the obligation will remain in effect. **The IRS may draw upon this bond in accordance with the terms of the Collateral Agreement.**

I believe the Collateral Agreement and Surety Bond, as revised above, are legally sufficient to protect the government's interest.

Please give me a call at (206)220-5951 after you look over these suggestions. I'd be more than happy to discuss any of the foregoing suggestions with you or the taxpayer's representative.

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